RECORD AND BRIEF

No. 16-32

Supreme Court, U.S.
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In The
Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP d/b/a WINCHESTER CENTRE FOR HEALTH AND REHABILITATION n/k/a FOUNTAIN CIRCLE HEALTH AND REHABILITATION; KINDRED NURSING CENTERS EAST, LLC; KINDRED HOSPITALS LIMITED PARTNERSHIP; KINDRED HEALTHCARE, INC.; KINDRED HEALTHCARE OPERATING, INC.; KINDRED REHAB SERVICES, INC. d/b/a PEOPLEFIRST REHABILITATION,

Petitioners,

v.

JANIS E. CLARK, Executrix of the Estate of OLIVE G. CLARK, deceased, and on behalf of the wrongful death beneficiaries of OLIVE G. CLARK and BEVERLY WELLNER, Individually and on Behalf of the Estate of JOE P. WELLNER, deceased, and on Behalf of the Wrongful Death Beneficiaries of JOE P. WELLNER,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Kentucky

BRIEF AMICUS CURIAE FOR GENESIS HEALTHCARE, INC., DIVERSICARE HEALTHCARE SERVICES, INC., GGNSC LOUISVILLE MT. HOLLY LLC D/B/A GOLDEN LIVINGCENTER – MT. HOLLY, BROOKDALE SENIOR LIVING INC., SIGNATURE HEALTHCARE, LLC, HCR MANORCARE AND KENTUCKY PARTNERS MANAGEMENT, LLC IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether the FAA preempts a state-law contract rule that singles out arbitration by requiring a power of attorney to expressly refer to arbitration agreements before the attorney-in-fact can bind her principal to an arbitration agreement.

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.3, Genesis Healthcare, Inc., Diversicare Healthcare Services, Inc., GGNSC Louisville Mt. Holly LLC d/b/a Golden LivingCenter – Mt. Holly, Brookdale Senior Living Inc., Signature HealthCARE, LLC, HCR ManorCare and Kentucky Partners Management, LLC, respectfully submit this *Amicus Curiae* brief in support of Petitioners.[1]

IDENTITY AND INTERESTS OF THE *AMICI*

Amicus curiae Genesis Healthcare, Inc. is a holding company with subsidiaries that, on a combined basis, comprise one of the nation's largest post-acute care providers with more than 500 skilled nursing centers and senior living communities in 34 states nationwide at present. Genesis subsidiaries also supply rehabilitation therapy to more than 1,700 locations in 45 states and the District of Columbia.

Amicus curiae Diversicare Healthcare Services, Inc., headquartered in Brentwood, Tennessee, employs 9,000 people offering wide-ranging post-acute care in

[1] Pursuant to Supreme Court Rule 37.3, *Amici* provided notice of intent to file this brief to counsel of record for the parties, who provided their written consent to its filing. The undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amici*, their members, or their counsel, made a monetary contribution specifically for the preparation or submission of this brief.

multiple settings, to include: complex medical, skilled nursing, short-term rehabilitative, long-term residency, memory assistance, respite and hospice care. Through a subsidiary, Diversicare operates 76 skilled nursing and long-term care facilities in ten Southern and Midwestern states.

Amicus curiae GGNSC Louisville Mt. Holly LLC d/b/a Golden LivingCenter – Mt. Holly is a member of a family of companies based in Plano, Texas. The Golden Living family of companies includes Golden LivingCenters, Aegis Therapies, AseraCare, and 360 Healthcare Staffing. There are 300 Golden LivingCenters in 21 states. Golden Living also offers assisted living services at more than 30 of its locations. Golden Living companies provide services to over 1,000 nursing homes, hospitals, and other healthcare organizations in 40 states and the District of Columbia. The Golden Living family of companies has more than 40,000 employees who provide healthcare to over 60,000 patients daily.

Amicus curiae Brookdale Senior Living Inc., based in Brentwood, Tennessee, operates 647 senior care communities in 36 states, including 74 retirement centers, 440 assisted living communities and 41 continuing care retirement centers. Brookdale communities have the ability to serve approximately 66,000 residents daily.

Amicus curiae Signature HealthCARE, LLC, is a Kentucky based long-term healthcare and rehabilitation company with 143 different facility locations (46

of them in Kentucky) that span across 11 different states, providing jobs to nearly 24,000 employees. A growing number of Signature centers are earning five-star ratings from the Centers for Medicare & Medicaid Services. Signature was named "Best Places to Work in KY" in 2014 and 2015 by the Kentucky Chamber of Commerce, and was nationally awarded by Modern Healthcare in 2013 and 2015.

Amicus curiae HCR ManorCare is a leading provider of short-term, post-hospital services and long-term care with a network of more than 500 skilled nursing and rehabilitation centers, memory care communities, assisted living facilities, outpatient rehabilitation clinics, and hospice and home healthcare agencies. Based in Toledo, Ohio, ManorCare employs more than 50,000 caregivers nationwide.

Amicus curiae Kentucky Partners Management, LLC, based in Plano, Texas, manages 21 skilled nursing facilities in the Commonwealth of Kentucky, which includes 1,762 nursing beds. Services offered at these nursing facilities include skilled nursing, short-term rehabilitative, long-term residency, and hospice care.

The Court has long recognized the many advantages of arbitration, including expense savings. *See, e.g.*, *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 280, 115 S. Ct. 834, 843, 130 L. Ed. 2d 753 (1995) ("The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing

and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices. . . ."). These features are particularly important for an industry so heavily reliant on government payor sources. For instance, in the fourth quarter of 2014, 15,634 nursing homes participated in the Medicare and Medicaid programs. *See, e.g.*, CMS Nursing Home Data Compendium 2015.[2]

An April 2016 American Health Care Association ("AHCA") commissioned study, *A Report on Shortfalls in Medicaid Funding for Nursing Center Care*, noted the nation's projected unreimbursed Medicaid costs to exceed $7 billion in 2015.[3] This shortfall amounts to approximately $22.46 per Medicaid patient/per day. *Id.* The 2015 projected shortfall increased 6.0% from the preceding year's projection. *Id.* For a typical 100-bed facility, where 63% of residents rely on Medicaid for coverage, this shortfall places losses at more than $1,415 dollars each day, exceeding $516,000 annually. On average, Medicaid reimbursed nursing center providers only 89.4%, or 89 cents on the dollar, of their projected allowable costs incurred on behalf of Medicaid patients. *Id.* at p.4.

This matter presents issues of significant importance to *Amici* because long-term care facilities enter into thousands of predispute arbitration agreements

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[2] Available online at: https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/Downloads/nursinghomedatacompendium_508-2015.pdf.

[3] Available online at: https://www.ahcancal.org/research_data/funding/Pages/2015-Medicaid-Shortfall-Report.aspx.

every year, many executed by an attorney-in-fact for the resident like the underlying cases here. Predispute arbitration agreements represent efficient, cost-effective alternatives to traditional civil litigation and are vital to *Amici* and the entire long-term care industry. However, following the Supreme Court of Kentucky's Opinion in *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2016), Kentucky state courts now refuse to enforce otherwise valid arbitration agreements. *Amici* encounter significant burdens from state courts' refusals to enforce arbitration contracts, like in Kentucky, whether because of state court hostility, misunderstanding of federal law and preemption, unconscionability principles, or other judicially-enacted state laws intentionally designed to avoid arbitration contract enforcement.

Congress passed the Federal Arbitration Act ("FAA") to combat the open judicial hostility to arbitration agreements so apparent here. *See Hall St. Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581, 128 S. Ct. 1396, 1402, 170 L. Ed. 2d 254 (2008) (*citing Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006)). *Whisman* embodies Kentucky state courts' latest creative attempt to avoid the FAA's preemptive mandate requiring arbitration contracts to be enforced on equal footing with other contracts and according to their terms. The Kentucky court refused to acknowledge this Court's arbitration precedent applies to it, and instead denounced the FAA as inapplicable to its reinvented interpretation of "state agency law." The *Whisman* court simply

ignored the well-established fundamental legal principle that, via the Supremacy Clause of the United States Constitution, Kentucky state law contrary to the FAA is invalid.

Amici have a genuine interest in the outcome of this case and in seeking uniform application of the FAA and consistent enforcement of valid arbitration agreements across the United States. Congress recognized arbitration contracts needed heightened protection to prohibit the flagrant hostility that – in fact – occurred here. Congress enacted the FAA as a method to resolve disputes quickly, efficiently and economically. Yet, Kentucky's highest state court acted with no regard for the FAA or the body of federal substantive law interpreting it. Instead, the Kentucky state court definitively denounced agent-executed arbitration contracts as neither favored nor protected in Kentucky. The Kentucky court's decision frustrates this Court's arbitration precedent and the FAA's policies and goals. *Amici* join Petitioners and encourage this Court to reverse the Supreme Court of Kentucky's decision in *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2016).

SUMMARY OF THE ARGUMENT

For the past ninety years, this Court has repeatedly rebuked the very "widespread judicial hostility to arbitration" that Congress enacted the Federal Arbitration Act to counter. *See, e.g., AT&T Mobility LLC v.*

Concepcion, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011). In *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012), this Court mandated, "State and federal courts must enforce the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., with respect to all arbitration agreements covered by that statute." Again, in *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 501 (2012) (per curiam), the Court proclaimed, "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA], including the Act's national policy favoring arbitration. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation."

Seemingly undaunted by these reprimands, state courts continue to exhibit the same hostilities that prompted the FAA, employing "'a great variety' of 'devices and formulas'" to avoid enforcing arbitration agreements. *Concepcion*, 563 U.S. at 342, 131 S. Ct. at 1747 (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)). *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2016) emerges as the Supreme Court of Kentucky's latest and most elaborate "device," disguised as an interpretation of state agency law to avoid enforcing agent-executed arbitration contracts, particularly those utilized in long-term care settings.

Despite *Concepcion*'s, *Marmet Health*'s and *Nitro-Lift*'s stern admonitions, Kentucky and other state courts persist with their interpretations of contract defenses, unconscionability concerns, state public policy

proclamations and similar rationales to avoid enforcing arbitration contracts under the FAA's mandate. For instance, *Whisman* found, "it would be impossible to say that entering into a pre-dispute arbitration agreement was not covered," by the authority granted in the resident's power of attorney document. Pet. App. 39a. Nevertheless, the court did the "impossible" and refused to enforce the agent-entered predispute arbitration contract for reasons not applicable to any other type of contracts under Kentucky law. Pet. App. 42a. The court reasoned arbitration contracts waived a "God-given right" to jury trial and such waiver could not be inferred from a "less than explicit grant" of the power "to execute contracts" in general. Pet. App. 40a; 43a. *Whisman*'s result, holding the same grant of agency authority authorized enforcement of contracts – just not arbitration contracts – violates the FAA via the Supremacy Clause of the U.S. Constitution. State law simply cannot ignore the federal law's preemptive effect. *See, e.g.*, *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 157 & fn.12, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982). Nor may Kentucky "opt out" of the Supremacy Clause: "When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established." *Marmet Health*, 132 S. Ct. 1201, 1202.

Amici, as long-term care providers in today's society, frequently find themselves under an increasing onslaught of legal, political and policy maneuvers designed and determined to eliminate predispute arbitration as a favorable option to courtroom litigation.

The Supreme Court of Kentucky's latest judicial policy-making effort is only one of several hurdles presented to *Amici* as efforts to block their right to contract freely for arbitration grow. Attorneys general, state senators, the Centers for Medicare & Medicaid Services, an aggressive plaintiff's bar – to name only a few – take all steps available designed to avoid the FAA's application and enforcement. In Kentucky especially, *Amici*'s right to contract for arbitration lacks the protection Congress intended by enacting the FAA.

Venue should play no part in substantive law, but it means everything in Kentucky after *Extendicare Homes, Inc. v. Whisman*. In *Whisman*'s wake, Kentucky is left with the new reality of a modern day "race to the courthouse." Kentucky parties to arbitration agreements must "race to the courthouse" to achieve their desired result. For parties seeking to avoid the enforcement of arbitration agreements, the preferred venue is Kentucky state courthouses. Kentucky's federal district courts provide the alternative for those hoping to enforce them. Unfortunately, Kentucky citizens lacking diversity to remove, or the ability to file an original federal action, often lose their right to enforce valid arbitration contracts.

The *Whisman* court attempted to disguise its ruling as an application of state contract law. In essence, the court determined the FAA need not be invoked if it defines state agency law to prevent contract formation in the first place. This Court must prohibit the

Kentucky court's flagrant end-around the FAA and reverse *Whisman*.

ARGUMENT IN SUPPORT OF THE PETITIONERS

The Supremacy Clause forbids state courts from dissociating themselves from federal law they do not like. *Cf., DirecTV, Inc. v. Imburgia*, 577 U.S. ___, 136 S. Ct. 463, 468, 193 L. Ed. 2d 365 (2015). "[T]he Judges of every State shall be bound" by "the Laws of the United States." U.S. CONSTITUTION, Art. VI, cl.2. Unrepentantly, the Supreme Court of Kentucky "rejected the notion" that its tortured holding conflicted with this Court's decisions in *Marmet Health*, 132 S. Ct. 1201, and *Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, on grounds that "our holding does not prohibit arbitration of any 'particular type of claim.'" Pet. App. 46a. *Whisman*'s overt rejection of federal substantive arbitration law deserves no deference and must be overturned. Kentucky state courts must not be permitted to carve exceptions into the FAA's preemptive mandate.

Whisman's decision, expressly denying that an agent's unrestricted "power to contract" for her principal *inherently* provides the authority to contract "for arbitration," overtly violates the FAA and conflicts with this Court's arbitration precedents and numerous federal district courts' holdings. *Whisman*'s aftermath leaves a significant jurisprudential divide between Kentucky's state and federal trial courts. *Amici* support

Petitioners' arguments explaining why *Whisman* violates the FAA and federal substantive arbitration law and must be reversed. *Amici* write separately to provide their perspective on these pressing circumstances.

I. *WHISMAN*'S RESTRICTIONS ON ARBITRATION RIGHTS POSE A SUBSTANTIAL THREAT TO THE ENTIRE LONG-TERM CARE INDUSTRY.

Enveloping uncertainty predominates as *Whisman*'s legacy. A significant number of long-term care residents, because of age, infirmity, or good estate planning principles utilize powers of attorney designating individuals authorized to conduct their business and personal affairs, including the right to enter into all types of contracts related to their principals' residencies at healthcare facilities. The Federal Arbitration Act ("FAA") requires arbitration contracts be enforced like all other contracts. *Whisman* carves an exception to that mandate by elevating the standard for enforcement of agent-executed arbitration contracts beyond that required for enforcement of any other agent-executed contract. *Whisman*'s standard exacerbates the progressively inordinate hardships encountered by long-term care entities seeking enforcement of their federal arbitration rights.

A. Nursing Home Arbitration Agreements Benefit All Parties Involved in Claims

Congress enacted the Federal Arbitration Act because it recognized arbitration to be an effective and economical alternative to litigation. Arbitration discovery is typically narrowed to the core of the dispute, and arbitration usually proceeds much more quickly than traditional litigation, which is subject to trial docket delays. By contrast, particularly in Kentucky, trial litigation is frequently encumbered by overly broad discovery virtually unlimited in scope or relevancy, resulting in extreme costs and lengthy delays. Most importantly, arbitration neither limits the types of claims that can be asserted nor the recoveries or damages available; it merely provides an alternative forum for resolution of the parties' dispute. *See American Health Care Association Special Study on Arbitration in the Long Term Care Industry*, AON Global Risk Consultants, June 16, 2009, p.5.

Public policy also supports the use of long-term care arbitration agreements. In *Amici*'s experience, most long-term care litigation cases resolve through settlement. When compared to traditional litigation in Kentucky, *Amici* find arbitration is more efficient, less adversarial, and reduces time to settlement.

This Court previously noted, "arbitration's advantages often would seem helpful to individuals, . . . who need a less expensive alternative to litigation." *Allied-Bruce Terminix Co. v. Dobson*, 13 U.S. 265, 280 (1995). In accord with *Amici*'s position, the *Dobson* Court

continued, "[t]he advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices. . . ." *Id.*

Respondent/Appellee posits that the Court should uphold *Whisman*'s result, contrary to existing federal law, allowing predispute arbitration agreements executed by agents (and especially in the long term care industry) to be enforced under a separate standard from all other contracts. This notion is at odds with Kentucky residents' constitutionally-protected right to contract for arbitration, as well as the fundamental right to contract protected by the Due Process Clause of the Fourteenth Amendment. *See* Kentucky Constitution Section 250 ("It shall be the duty of the General Assembly to enact such laws as shall be necessary and proper to decide differences by arbitrators, the arbitrators to be appointed by the parties who may choose that summary mode of adjustment"). *See also*, U.S. CONST. AMEND. XIV, § 1. This Court has long recognized the general right of an individual to contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment. *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S. Ct. 427, 41 L. Ed. 832 (1897).

Arbitration has been proven to reduce costs vastly, as well as enable patients and their families to retain a greater proportion of any settlement than with

traditional litigation contingency fee contracts. Kentucky has the highest loss rate (annual amount per occupied bed required to defend, settle or litigate claims in a year) of the states profiled in AON's *2015 General Liability and Professional Liability Actuarial Analysis*. Although AON reported the average projected 2016 loss rate to be $2,150 per bed, in Kentucky that number skyrockets to $9,820 per bed and is projected to grow by 5.0% annually.[4] This means that less than half of the dollars spent on liability is actually going to the patients and their families. *Id.* at 30-31. Therefore, decreased arbitration costs mean more of the award goes to the patient or resident, not his/her legal representative.

Kentucky ranks at or near the bottom in all categories concerning claim severity, costs and loss rates. For instance, Kentucky's claim severity was the worst of all states surveyed in the AON 2015 study and has averaged above $340,000 per claim since 2008, reaching as high as $401,000 per claim in 2015. *Id.* at p.31. Another AON study concluded that, as compared to traditional litigation, average long-term care provider expenses for claims arbitrated are 41% lower than those litigated. Moreover, arbitration challenges result in the highest associated expense: claims resolved after the court holds the arbitration agreement

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[4] Long Term Care – *2015 General Liability and Professional Liability Actuarial Analysis*, AON Global Risk Consulting, p.4, available online at: https://www.ahcancal.org/research_data/liability/Documents/2015%20General%20Liability%20and%20Professional%20Liability%20Actuarial%20Analysis%20Report.pdf.

unenforceable have much higher total costs than those resolved following enforcement of the arbitration agreement. *See American Health Care Association Special Study on Arbitration in the Long Term Care Industry*, AON Global Risk Consultants, June 16, 2009, p.4.[5]

Claims subject to arbitration settle three months sooner. *See* AON's 2015 *General Liability Analysis*, at p.2. Claim frequency increases by 2% each year. *Id.* *Amici* support use of arbitration as a dispute resolution tool to counter the highly aggressive litigation climate facing long-term care facilities today. However, changing political climates, healthcare reform uncertainties and aggressive campaigns from the plaintiff's bar continue to provide major obstacles for Kentucky providers' ever-dwindling arbitration options. Recently, on October 4, 2016, the Centers for Medicare & Medicaid Services ("CMS") promulgated a rule, actively advocated by several members of Congress as well as several states' Attorneys General, asking CMS to ban predispute arbitration agreements in the long-term care setting, resulting in precisely that action. *See* Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities; Arbitration Rule, 81 Fed. Reg. 68,688 (Oct. 4, 2016).[6]

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[5] Available online at: https://www.ahcancal.org/research_data/liability/Documents/2009%20Special%20Study%20on%20Arbitration%20in%20Long%20Term%20Care.pdf.

[6] *See* footnote 10, *infra*.

Even ten years ago, a federal government review of long-term care liability issues concluded:

> At the root of this policy issue are the views and perceptions of the American public. In negotiating settlements, plaintiffs and defendants make decisions about compensation for damages based upon their shared judgments of what juries would decide if cases were to go to trial. Most every person interviewed during this study, whether they were associated with the plaintiff side or the defendant side of the issue, agreed that **the decisions of juries in nursing home negligence cases are virtually impossible to predict**.

Recent Trends in the Nursing Home Liability Insurance Market, U.S. Department of Health and Human Services Assistant Secretary for Planning and Evaluation Office of Disability, Aging and Long-Term Care Policy, June 2006.[7] Regardless, the long-term care industry is a highly regulated industry, subject to government inspections, licensing, and ratings, among other compliance mandates. This regulation, not capricious litigation results, deters substandard care and provides quality care incentives. *See, e.g.*, 42 CFR Part 483, Subpart B – Requirements for Long Term Care Facilities.

Finally, state and federal taxpayers actually bear the cost of long-term care litigation and concomitant rising liability insurance expenses because long-term care is overwhelmingly reimbursed by Medicare and

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[7] Available online at: http://Aspe.Hhs.Gov/Daltcp/Reports/2006/Nhliab.pdf.

Medicaid. In Kentucky, the loss rates as a percentage of Medicaid reimbursement amounted to 14.66% in 2015, again the highest among the states profiled. *See AON 2015 Long Term Care Liability Study*, p.31. Therefore, in the best interests of Kentucky's citizens as well as its long-term care providers, the Court should reverse *Whisman* to preserve arbitration as a fair, efficient and economically sound alternative for Kentucky long-term care providers and their residents alike.

B. *Whisman* Results in Uncertainty in Kentucky Law

Petitioners and the *Amici* belong to a highly-regulated industry. Provider facilities rely daily upon identifiable factors to operate while anticipating a multitude of contingencies. Long-term care entities provide protection, housing, medical treatment, therapy, companion services, nutritional fulfillment, counseling and numerous other services to their residents daily. *Amici* must be able to rely on their abilities to plan, budget and prepare for a myriad of scenarios, including litigation and insurance costs. As an industry, *Amici* count on their ability and right to contract, to include contracts for arbitral resolution of claims. As shown above, the anti-arbitration climate makes planning and preparing increasingly uncertain and difficult.

Pre-*Whisman*, long-term care providers in Kentucky could identify the number of residents admitted by agents under powers of attorney, who also agreed to arbitration for any potential claims. Kentucky established durable general powers of attorney by statute

and recognized the authority authorized therein. *See* KRS § 386.093. Courts enforced those grants of authority. *See, e.g., Kindred Healthcare, Inc. v. Cherolis*, 2013 WL 5583587 (Ky. App. Oct. 11, 2013), *vacated on remand* from the Kentucky Supreme Court in light of *Whisman, by Kindred Healthcare, Inc. v. Cherolis*, 2016 WL 6134910 (Ky. App. Oct. 21, 2016). Pre-*Whisman* status quo provided *Amici* a respectable level of certainty for business tracking, planning and budgeting.

However, post-*Whisman*, regardless of the express grant of authority given by the principal therein, an agent acting under a written power of attorney no longer affords certain authority. The determination as to whether a Kentucky court will enforce the arbitration agreement now, in fact, depends almost entirely on whether the case is filed in federal or state court. *See, e.g., Preferred Care of Delaware, Inc. v. Crocker*, 173 F. Supp. 3d 505, 521 (W.D. Ky. 2016) (currently on appeal in Sixth Circuit Court of Appeals, Case No. 16-6179) (Ms. Crocker filed personal injury claim in state court; Preferred Care sought to enforce arbitration contract and compel arbitration in federal court. State court ruled first, holding ADR contract unenforceable in accordance with *Whisman*, and federal district court's subsequent finding of enforceable ADR contract later held barred by *res judicata* principles). *See* Section III, *infra*, for additional discussion.

Whisman severely restricted the *Amici*'s ability to contract as an industry. *Amici* and residents voluntarily enter into thousands of predispute arbitration agreements every year, many executed by attorneys-in-fact on the resident's behalf like the underlying

cases here. Predispute arbitration agreements represent efficient, cost-effective alternatives to traditional civil litigation, vital to *Amici* and the entire long-term care industry. Arbitration, both because it is quicker and procedurally simpler, reduces transaction expenses retaining more resources for resident care and claim resolution. *Amici* typically present residents with arbitration agreements upon admission. Some are standalone agreements; some form part of the admissions agreement.

Pursuant to the Supremacy Clause of the U.S. Constitution, the FAA is the law in all states – not "all states *except* Kentucky." Nevertheless, the *Whisman* court refused to apply the FAA's body of federal substantive law and specifically rejected the FAA as not applicable to the facts presented. Given its stated reasoning, it appears the *Whisman* court would have found Ms. Clark's attorney-in-fact had power to bind Ms. Clark to any *other* contract – just not an arbitration contract. Pet. App. 39a-40a. Stated otherwise, the *Whisman* court did not consider, as it claimed, the agent's "authority to form any contract," but instead heightened the conditions under which it vowed to enforce *arbitration* contracts, only, by defining heightened standards to be applied when the contract involves arbitration. Pet. App. 42a-44a.

The *Whisman* court's interpretation of the FAA and its application to this matter holds ramifications far beyond this case. The state court's holding, if allowed to stand, will continue to generate disparate results, especially as between state and federal courts, create uncertainty, irreparable harm and confusion

within the realm of general public interest. Individuals and businesses alike will be unable to rely upon their constitutionally-protected right to contract for arbitration in both commercial and private contexts. Contracts previously made in good faith under prevailing laws will be subject to immediate invalidation. *Amici* are aware of multiple cases currently on appeal in Kentucky's courts concerning the interpretation and enforcement of arbitration contracts executed under powers of attorney.

Additionally, *Whisman*'s holding poses a substantial threat to the long-term care industry at a time when demographic trends dictate that the provision of long-term care will become increasingly important. Because of rapid healthcare improvements, the United States is an ageing society. The need for long-term care increases daily as our population lives longer. Between 2000 and 2050, the number of older people is projected to increase by 135%. Moreover, the population aged 85 and over, which is the group most likely to need health and long-term care services, is projected to increase by 350%. Over this time period, the proportion of the population that is over the age of 65 will increase from 12.7% in 2000 to 20.3% in 2050; the proportion of the population that is age 85 and older will increase from 1.6% in 2000 to 4.8% in 2050. *See Population Ageing in the United States of America: Implications for Public Programmes*, Oxford International Journal of Epidemiology, 2002, Vol. 31, Issue 4, pp.776-781.[8] As the U.S. population ages, the long-term care industry will play

[8] Available online at: http://ije.oxfordjournals.org/content/31/4/776.full.

a prominent role in providing healthcare to the nation's elderly.[9] It is virtually undisputed that the future well-being of the country's aging population depends on a strong long-term care industry.

In addition to undue litigation burdens hindering its ability to enforce its federal arbitration rights, the nation's long-term care industry faces a number of other challenges which threaten it, including economic, governmental, and regulatory pressures. As discussed, in 2016, the Centers for Medicare & Medicaid Services proposed a rule to prohibit predispute arbitration contracts in long-term care settings. *See* Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities; Arbitration Rule, 81 Fed. Reg. 68,688 (Oct. 4, 2016).[10] Moreover, skilled nursing

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[9] The population age 65 and over has increased from 36.2 million in 2004 to 46.2 million in 2014 (a 28% increase) and is projected to more than double to 98 million in 2060. By 2040, there will be about 82.3 million older persons, twice the number in 2000. People 65+ represented 14.5% of the population in the year 2014, but are expected to grow to 21.7% of the population by 2040. The 85+ population is projected to triple from 6.2 million in 2014 to 14.6 million in 2040. *See* U.S. Dep't of Health & Human Servs., Admin, on Aging, *Aging Statistics* (updated through 2015), available online at: http://www.aoa.gov/aoaroot/aging_statistics/index.aspx.

[10] Although the U.S. District Court for Northern District of Mississippi temporarily enjoined CMS from enforcing a rule that bans predispute arbitration contracts and facially violates the FAA, the matter is not yet resolved and will continue to percolate through the courts, providing still more proof of ongoing arbitration hostility. *See American Health Care Association et al. v. Burwell*, Case 3:16-cv-00233-MPM-RP, Doc. 44, PageID#: 8583-8622.

facilities face a cumulative Medicare funding reduction worth $65 billion over the next six years.[11]

The long-term care industry cannot seek legislative protection against this onslaught in states like Kentucky, Illinois, Arkansas, and Georgia, where state constitutional doctrines exist and defeat all efforts at tort reform legislation aimed at deterring the filing of meritless claims and providing incentives for meritorous claims. *See Williams v. Wilson*, 972 S.W.2d 260, 267 (Ky. 1998); *Bayer CropScience LP v. Schafer*, 2011 Ark. 518, 385 S.W.3d 822 (2011); *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 914 (Ill. 2010); *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 220 (Ga. 2010). Courts should encourage efficient dispute resolution in long-term care settings. *Amici* join the Petitioners in asking this Court to reverse *Whisman*.

II. THE KENTUCKY COURT'S DECISION IN *WHISMAN* CONSTITUTES THE STATE'S LATEST ATTEMPT TO EVADE *CONCEPCION* AND THE FAA.

The Kentucky court attempted to evade FAA preemption, this time under the guise of state law contract formation. This latest result procreates "the judicial hostility towards arbitration that prompted the FAA [which has] manifested itself in 'a great variety' of

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[11] *$65 billion in Medicare cuts to rock U.S. nursing homes over 10 years, analysis shows*, McKnight's Long-Term Care News (Aug. 2, 2012), available online at: http://www.mcknights.com/65-billion-in-medicare-cuts-to-rock-us-nursing-homes-over-10-years-analysis-shows/article/253036.

'devices and formulas' declaring arbitration against public policy." *Concepcion*, 131 S. Ct. at 1747.

Concepcion explained how Congress carefully tempered the FAA's mandate to respect parties' freedom of contract by including in the FAA a saving clause that preserves generally applicable contract defenses from preemption. *Id.* at 1748. But even a defense that a state court characterizes as generally applicable to all contracts, as does the *Whisman* court, is preempted by the FAA if the defense "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 1747-48. This is the main reason why *Whisman* cannot stand.

When a contract defense nominally considered to be arbitration-neutral disproportionately invalidates arbitration agreements, that defense offends the FAA's objectives and is preempted. *See id.* Even prior to *Whisman*, Kentucky's highest court historically resisted *Concepcion* in less obvious, but no less troubling, ways. For example, in 2012, the Kentucky Supreme Court rendered *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012). *Ping* severely limited (and quite possibly confused) Kentucky law of agency concerning specific versus general powers of attorney to reach its desired result. *Ping* re-characterized a general durable power of attorney containing broad, general grants of authority from the principal as one granting powers specifically over healthcare, business and finances. *Id.* at 588-89. Working within this now-narrowed frame, *Ping* refused to hold that a POA granting limited powers could be interpreted to allow the attorney-in-fact to

sign an optional predispute arbitration agreement on her principal's behalf when not required for the long-term care admission. *Id.* at 592. The Kentucky court even then asserted its "authority" to denounce the FAA as enforceable subject to contrary state law, repudiating this Court's precedent. *See, e.g.*, *Perry v. Thomas*, 482 U.S. 483, 489-90, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985); *Southland Corp. v. Keating*, 465 U.S. 1, 10-11, 16 & fn.11, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). *Ping* exposed the Supreme Court of Kentucky's unbridled bias and hostility towards arbitration. *Whisman* confirmed its continued, jurisprudential prevalence. Interestingly, *Ping*'s author dissented from the *Whisman* majority and stated that *Whisman* did not follow *Ping*'s limitation and interpretations applying to agency law, but rather extended it in a manner violating the FAA. *See Whisman*, Pet. App. 69a-74a (Abramson, J., dissenting.).

The *Whisman* court noted the FAA was implicated only *if* a contract was formed between the parties. Pet. App. 24a. Although the state court acknowledged the principals empowered their agents with express authority "to sign contracts," the court held this grant of power insufficient to create an *arbitration* contract, in particular, because arbitration contracts carry implications beyond those of other contracts. Pet. App. 42a. *Whisman* thus elevated the standard for enforcing arbitration contracts by requiring something different

from other contracts. *Id.* In doing so, the court purported to rely on state law contract and agency principles (e.g., requirements for contract formation with agents) and overtly rejected contrary holdings of this Court and federal courts. *See* Pet. App. 24a-48a; *but see Concepcion*, 563 U.S. at 352 (if an otherwise neutral contract defense "stand[s] as an obstacle to the accomplishment of the FAA's objectives," the FAA preempts it) (*citing Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)).

In particular, the *Whisman* court "rejected the notion" that its tortured holding conflicted with this Court's decisions in *Marmet Health*, 132 S. Ct. 1201, and *Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, on grounds that "our holding does not prohibit arbitration of any 'particular type of claim.'" Pet. App. 46a. The Kentucky court appears to have misunderstood *Concepcion*'s test requires an additional level of analysis to pass muster. *See Concepcion*, 563 U.S. at 339 ("This [9 U.S.C. § 2] saving clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."). *Accord*, *Crocker*, 173 F. Supp. 3d 521 ("Though the second inquiry under *Concepcion* is "more complex," this Court believes that the Kentucky Supreme Court's decision in *Whisman* fails the second inquiry and, therefore, is invalid."). Otherwise, it brazenly disregarded this Court's precedent as "inapplicable," Pet. App. 24a, and confirms the

judicial hostility to arbitration the FAA originally sought to extinguish still thrives in Kentucky.

This Court should reverse and instruct the Kentucky court and other state courts to follow the Supremacy Clause and the policy of the FAA by enforcing arbitration agreements as written, even when this leads to a result at odds with state public policy, state unconscionability doctrines, or other principles of state law.

III. KENTUCKY'S FEDERAL DISTRICT COURTS UNANIMOUSLY DISAGREE WITH *WHISMAN*'S REASONING, RESULTING IN RACE TO COURTHOUSE.

Every U.S. District Court in Kentucky that has considered the application of *Whisman*'s reasoning/result has reached the conclusion that *Whisman*'s holding is invalid and its decision violates the FAA and Supremacy Clause, prohibits enforcement of valid arbitration contracts and cannot be enforced to that result.[12] Unfortunately, lower Kentucky state courts remain bound by Kentucky Supreme Court Rule to follow and apply *Whisman*. *See* SCR 1.030(8) (Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court), and SCR 1.040(5) (circuit and district courts

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[12] *Amici* has found no Kentucky federal district court opinion that enforced *Whisman*'s rule or application. Rather, the U.S. District Courts in the Eastern and Western Districts of Kentucky have unanimously held *Whisman* is invalid.

are bound by and shall follow applicable precedents established in the opinions of the Supreme Court and Court of Appeals).

Venue should play no part in substantive law, but it means everything in Kentucky after *Extendicare Homes, Inc. v. Whisman*. In *Whisman*'s wake, Kentucky parties to arbitration agreements must now "race to the courthouse" – to avoid enforcement of an arbitration agreement, Kentucky state courthouses. Kentucky's federal district courts provide the alternative for those hoping to enforce arbitration contracts. Unfortunately, Kentucky citizens lacking diversity to remove or file an original federal action often lose their right to enforce valid arbitration contracts. *See, e.g.*, *Crocker*, 173 F. Supp. 3d 505 (on appeal in Sixth Circuit Court of Appeals, Case No. 16-6179) (Crocker filed personal injury claim in state court; Preferred Care sought to compel arbitration in federal court. State court ruled first, holding ADR contract unenforceable in accordance with *Whisman*, and federal district court's subsequent finding of enforceable ADR contract later held barred by *res judicata* principles).

Intrastate "conflicts undercut basic rule of law expectations. Allowing the content of national constitutional law to depend on . . . whether a case is filed in state or federal court is at odds with the core expectation of horizontal consistency in the law's content and application." Wayne A. Logan, *A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights*, 90 NOTRE DAME LAW REVIEW 235, 258, Appendix (2014) (*citing* Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. LAW REVIEW 1243, 1249 (1999)). "The

Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual." *Truax v. Corrigan*, 257 U.S. 312, 338 (1921).

These U.S. District Courts in the Eastern and Western Districts of Kentucky found *Whisman* to be invalid: *GGNSC Louisville Hillcreek, LLC v. Watkins*, 2016 WL 815295 (W.D. Ky. Feb. 29, 2016); *Preferred Care of Delaware, Inc. v. Crocker*, 173 F. Supp. 3d 505 (W.D. Ky. 2016); *GGNSC Louisville Mt. Holly, LLC v. Leslie Guess Mohamed-Vall*, Case No. 3:16-cv-136-DJH (W.D. Ky. April 6, 2016); *Owensboro Health Facilities, L.P. v. Henderson*, 2016 WL 2853569 (W.D. Ky. May 13, 2016); *Riney v. GGNSC Louisville St. Matthews, LLC d/b/a Golden Living Center – St. Matthews*, 2016 WL 2853568 (W.D. Ky. May 13, 2016); *Brandenburg Health Facilities, LP v. Mattingly*, 2016 WL 3448733 (W.D. Ky. June 20, 2016); *Preferred Care of Delaware, Inc. v. Hopkins*, 2016 WL 3546407 (W.D. Ky. June 23, 2016); *Pine Tree Villa, Inc., LLC d/b/a Regis Woods v. Coulter*, 2016 WL 3030185 (W.D. Ky. May 25, 2016); *GGNSC Stanford, LLC v. Gilliam*, ___ F. Supp. 3d ___, 2016 WL 4700135 (E.D. Ky. Sept. 7, 2016); *Diversicare Highland, LLC v. Lee*, 2016 WL 3512256 (W.D. Ky. June 21, 2016).

In light of these recent opinions, this Court should also consider the very concerns Justice Abramson (now Hughes) expressed in her *Whisman* dissent.

> Unlike the majority's examples, all of which suppose the waiver or compromise of a basic, personal substantive right (rights that an ordinary attorney-in-fact is rarely, if ever, asked

> to address on the principal's behalf), arbitration agreements, which are commonplace these days, involve no substantive waiver. The principal's substantive rights remain intact, only the forum for addressing those rights is affected. The majority's apparent presumption that the arbitration agreement has substantive implications adverse to the principal (and thus belongs on the list of hard-to-waive substantive rights) is the very presumption Congress sought to counteract with the FAA.
>
> Thus, while it may well be possible to frame a rule under state law to the effect that a presumption exists against an agent's authority to waive certain substantive rights of the principal, it does not follow that state law would include the right to civil trial among those presumptively non-waivable rights; and even if, as the majority would have it, the state rule did purport to hold sacrosanct the principal's right to trial in civil cases, under *Concepcion* and the FAA, the saving clause of which is not to be construed as a self-destruct mechanism, that aspect of the state rule would be preempted by federal law.

See Pet. App. 97a-98a (Abramson, J., dissenting).

While principals are free to discriminate against arbitration or certain types of contracts in their POA's, the FAA absolutely prohibits courts from doing what the principal did not do: *inferring* that discrimination. "Evidence" of discrimination against arbitration cannot arise from the POA's mere omission of certain "waiver" language when this Court has affirmed that

the right to jury trial can be waived, constitutionally, by similar omission. *See, e.g.*, *Yakus v. United States*, 321 U.S. 414, 444, 64 S. Ct. 660, 677 (1944).

Joe Wellner's Power of Attorney document granted his attorney-in-fact powers to "make, execute and deliver deeds, releases, conveyances and *contracts of every nature* in relation to both real and personal property, including stocks, bonds and insurance." Joint Appendix 10-11 (emphasis added). His POA contained additional grants to "demand, sue for, collect, recover and receive all debts, monies, interest and demands whatsoever now due or that may hereafter be or become due to me (including the right to institute legal proceedings therefor)." Joint App. 10. Likewise, Olive Clark's "General Durable Power of Attorney to Conduct All Business and Personal Affairs of Principal" granted her attorney-in-fact, "with full power for me and in my name . . . in her sole discretion" to "transact, handle, and dispose of all matters affecting me and/or my estate in any possible way." Joint App. 7. Her POA granted powers to "draw, make and sign in my name any and all checks, promissory notes, *contracts*, deeds or *agreements*." Joint App. 7 (emphasis added). Her POA also granted authority to "institute or defend suits concerning my property or rights," and "Generally to do and perform for me and in my name all that I might do if present." Pet. App. 19a. Either Mr. Wellner or Ms. Clark could have limited his or her agent's ability to enter into arbitration contracts, but neither

did. Both specifically empowered execution of "contracts" ("of every nature" and "any and all") without exception.

Kentucky's federal district courts agree. In *Watkins*, Judge Hale found *Whisman* inapplicable to the ultimate result but questioned the *Whisman* Majority Opinion's reasoning as not consistent with applicable federal law, *citing Whisman*, 478 S.W.3d at 354 (Hughes, J., dissenting) ("[A]s the United States Supreme Court has made absolutely clear, what state law cannot do directly – disfavor arbitration – it also cannot do indirectly by favoring arbitration's correlative opposite, a judicial trial. Since that is the express purpose of the rule the majority pronounces and since the application of that rule will clearly have a disproportionate effect on the ability of agents to enter arbitration agreements (as opposed to other contracts), the majority's new rule is plainly invalid."). *See Watkins*, 2016 WL 815295, at *5, at fn.3.

In *Crocker*, Judge Russell went a step further and held *Whisman* to be "invalid" as violative of the FAA:

> [T]his Court believes that the Kentucky Supreme Court's decision in *Whisman* fails the second inquiry [of *Concepcion*] and, therefore, is invalid. The rule established by Kentucky's highest court conflicts with the goals and policies of the FAA, as they are "antithetical to threshold limitations placed specifically and solely on arbitration." *Doctor's Associates* [*Inc. v. Casarotto*], 517 U.S. [681, 688 (1996)]. The

> Kentucky Supreme Court's requirement that a principal in his power of attorney explicitly convey to an attorney-in-fact the right to enter into a pre-dispute arbitration agreement "places arbitration agreements in a class apart from 'any contract,' and singularly limits their validity." *Id.* Consequently, the court's rule is "inconsonant with, and is therefore preempted by, the federal law." *Id.*

Crocker, 173 F. Supp. 3d at 521.

The *Mohamed-Vall* court also rejected *Whisman*: "The FAA's purpose . . . is 'to place arbitration agreements upon the same footing as other contracts.' [Citation omitted.] Accordingly, the Court will not apply *Whisman* to the extent that it conflicts with U.S. Supreme Court precedent by treating an agreement to arbitrate differently than any other contract." *Mohamed-Vall*, at p.9 of 14 (Page ID#: 347). And in both *Henderson* and *Riney*, Judge McKinley of the Western District of Kentucky adopted verbatim Judge Russell's reasoning in *Crocker*, finding *Whisman*'s holding "invalid." *See Henderson*, at pp.7-8 of 9 (Page ID#: 209-210); *Riney*, at pp.6-7 of 8 (Page ID#: 90-91). *Hopkins* and *Coulter* also join with *Crocker*'s reasoning. *See Hopkins*, 2016 WL 3546407, at *4; *Coulter*, 2016 WL 3030185, at *3. The Kentucky court's opinion moved Judge Stivers of the Western District of Kentucky to comment:

> Applying *Whisman* to invalidate the arbitration agreement signed by Decedent's husband would run afoul of the FAA. Although the

> Kentucky Supreme Court's antipathy for arbitration was more subtly expressed in its earlier decision in *Ping* [v. *Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012)], its true colors were revealed fully in *Whisman*. . . . [T]he rule expressed in *Whisman* contravenes the FAA[.]

Preferred Care of Delaware, Inc. v. Hopkins, 2016 WL 3546407 (W.D. Ky. June 23, 2016). *Whisman* was wrongly decided.

The *Whisman* court and Respondent erroneously posit the FAA is not implicated here because the parties never formed a contract under Kentucky's state law of agency. Yet, every Kentucky federal district court analyzing *Whisman*'s rule of law rejects that argument and agrees: *Whisman* targets *enforcement* of arbitration contracts, specifically, and flagrantly violates the FAA. Regardless of *Whisman*'s attempt to disguise its anti-arbitration ruling, Kentucky's federal district courts rightfully recognize that *Whisman*'s holding actually elevates enforcement standards for valid, agent-executed arbitration contracts, implicating and violating the FAA.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the judgment below must be reversed. *Whisman* is enormously detrimental to the

long-term care industry, particularly if its reasoning spreads beyond Kentucky to other states.

Respectfully submitted,

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